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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6769

CHARLES HUGH BROWN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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IN THE

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October Term, 1977

No. 77-

CHARLES HUGH BROWN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the First District of the State of Florida, entered in the above entitled case on June 15, 1977.

OPINIONS BELOW

1. The decision of the District Court of Appeal, First District, dated June 15, 1977, affirmed the Petitioner's conviction without opinion. That decision is unreported. Appendix infra, page 5A.

2. The opinion of the District Court of Appeal, First District, dated July 25, 1977, denied the Petition for Rehearing in the cause. That decision is unreported. Appendix infra, page 6A.

3. The opinion of the Supreme Court of Florida, dated December 8, 1977, denied a Petition for Certiorari to review the decision of the District Court of Appeal, First

District.[1] That decision is reported at 355 So.2d 512 (Fla. 1978). Appendix infra, pages 7A and 8A.

4. The opinion of the Supreme Court of Florida, dated February 20, 1978, denied the Petition for Rehearing of the denial of the Petition for Certiorari to the District Court of Appeal, First District. That opinion is unreported. Appendix infra, page 9A.

JURISDICTION

The judgment of the District Court of Appeal, First District, State of Florida, was entered on June 15, 1977, and became final upon the entry of the Order of the Supreme Court of Florida denying the Petition for Rehearing, dated February 20, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits unconsented night time entry of a dwelling to arrest all occupants therein, without warrant, in the complete absence of exigent circumstances.

2. Whether knowledge that contraband is stored in a separate garage, and that a sale of some of that contraband by an unidentified person has been effected, constitutes sufficient probable cause to enter a dwelling known to be occupied by several persons, at night, to arrest without warrant all occupants of the dwelling, absent exigent circumstances.

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[1] Under Art. V, §4(b)(1), Fla. Const., District Courts of Appeal are "the highest court of [the] State where a decision could be had," except where the District Court's opinion "is in direct conflict with a decision of any District Court of Appeal or of the Supreme Court on the same question of law." [Fla. Const. Art. V, §3(b)(3)], in which case review by the Supreme Court of Florida may be had by certiorari. Cf Williams v. Florida, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970).

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

At 10:30 P. M. on May 24, 1975, an undercover agent of the Duval County Sheriff's Office arranged a "buy" of marijuana from one Anthony Cataldo. Mr. Cataldo had never been used as an informant before, nor had his reliability been previously established.[2] Upon completing the sale of approximately six pounds of marijuana to Officer D. E. Taylor, Cataldo was informed of Taylor's identity and arrested.[3]

Mr. Cataldo then informed Officer Taylor that the marijuana had been purchased from one Chuck Brown at 6209 Schindler Drive.[4] Mr. Cataldo stated that an additional 30 to 40 pounds of marijuana remained in the garage located behind the residence.[5] Mr. Cataldo did not state that any marijuana was observed in the dwelling, although he did indicate that "four or five people" were in the house at the time.[6]

Cataldo did not indicate that any of the occupants were armed, nor were any weapons found during the subsequent search of the house.[7] Cataldo gave no indication that any of the occupants of the dwelling were leaving or preparing to leave.[8] When asked if there was "any reason to believe that something

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2 R Vol. II, pages 56-7.

3 R Vol. II, page 20.

4 This statement was corroborated by the observations of Detective Howell, who had the house under surveillance and had seen Cataldo and an unidentified white male walk from behind the house with a package shortly before Cataldo's arrest. (R Vol. II, pages 125-26.

5 R Vol. II, pages 24-5.

6 R Vol. II, page 25.

7 R Vol. II, page 92.

8 R Vol. II, page 87.

might be destroyed at the house," Officer Taylor candidly admitted that "[w]e always have reason to believe that."[9]

Based solely on Cataldo's statements, corroborated by the observation of Detective Howell, Officer Taylor telephoned an Assistant State Attorney and was advised that, in the opinion of the State Attorney, probable cause existed to obtain a search warrant for the premises.[10] Although no exigent circumstances existed which weighed against waiting for the search warrant to be obtained, Officer Taylor immediately called in additional police officers and informed them that "it was our plan to go to the house and arrest the people inside."[11] Although Cataldo had identified Chuck Brown as the seller of the marijuana, the officers did not know which of the several occupants of the dwelling was Brown.[12] Officer Taylor "felt like...[all] the people had committed a felony...[and] this is the reason the people were arrested."[13] Notwithstanding the efforts to obtain a search warrant to authorize this night time incursion into a dwelling, Officer Taylor "[knew] enough about law enforcement that [he] didn't need an arrest warrant at that time."[14]

At approximately 1:45 A. M., four or five police cars drove to the residence at 6209 Shindler Drive.[15] The residence was completely fenced, necessitating that the police officers drive through a gate and "onto the property to make the arrests."[16] Upon exiting their cars, the officers observed an unidentified white male who had just walked from the dwelling to stand on the stoop. The white male was immediately arrested and

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9 R Vol. II, page 59.

10 A search warrant was, in fact, obtained several hours later. R Vol. I, pages 1 through 5.

11 R Vol. II, page 28.

12 R Vol. II, page 40.

13 R pages 47-8.

14 R Vol. II, pages 60-61.

15 R Vol. II, pages 29-31.

16 R Vol. II, pages 88-89.

subsequently identified as the Petitioner, Charles Brown.[17]

Without knocking or announcing in any way their presence or authority,[18] the policemen entered the house and began a room to room search. At that point, according to Detective Taylor, the police officers "were searching for bodies [to arrest].... We felt like we could do our searching [for contraband] later when we returned with our search warrant."[19] Some contraband was seized incident to these arrests and, three hours later, the search warrant was obtained and executed, yielding 180 pounds of marijuana from the garage.

A Motion to Suppress the contraband was timely filed with the trial Court, alleging, inter alia, that the defendant's arrest without warrant under these facts was in violation of his constitutional rights.[20] That motion was denied by the trial Court, following an evidentiary hearing.[21] Thereafter, on November 4, 1975, the Petitioner pled nolo contendere to the charge of possession of a controlled substance with intent to sell, as well as possession of paraphernalia, and was sentenced to two five year sentences, to run consecutively.[22] The plea of nolo contendere specifically reserved the right to appeal the trial Court's denial of the Motion to Suppress.

An appeal was timely filed with the District Court of Appeal for the First District, assigning as error the trial Court's denial of the Petitioner's Motion to Suppress[23] and asserting that his "warrantless arrest...was illegal and unconstitutional...." On June 15, 1977, the District Court of

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17 "Although the police officers, having advanced through the gate, up the driveway, and onto the porch, then smelled burning marijuana, as Officer Taylor candidly admitted, "I was...going to move in and arrest the people, had I smelled the marijuana or not." (R Vol. II, page 48).

18 R Vol. II, pages 44-45.

19 R Vol. II, page 63. [App., infra, page 1A]

20 R Vol. I, page 17. [App., infra, page 4A]

21 R Vol. I, page 20.

22 R Vol. I, pages 26-27.

23 R Vol. I, page 35.

Appeal for the First District affirmed the conviction, and, on July 25, 1977, denied Brown's Petition for Rehearing.

Thereafter, a Petition for Certiorari was timely filed with the Florida Supreme Court, which denied certiorari by its Order dated February 20, 1978.

REASONS FOR GRANTING THE WRIT

I

This Petition raises the question of whether, and under what circumstances, police may forcibly enter a dwelling, at night, for the purpose of arresting all of its occupants without benefit of an arrest warrant. This "grave constitutional question,"[24] first posed by Mr. Justice Harlan, remains unanswered[25] by this Court. While the Court has previously considered whether arrests conformed with the constitutional standard,[26] the rule which has been enunciated has emerged from the decisions of the Circuit Courts. Given the "history of the use, and not infrequent abuse of the power to arrest,"[27] the rule which has emerged from the decisions of the Circuit Courts[27a] establishes that the Fourth Amendment requires a negative answer to the question presented. It is therefore submitted that the decision of the District Court of Appeal for the First District, State of Florida, has decided an important

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24 Jones v. United States, 357 U.S. 493, 499-500, 2 L.Ed.2d 1514, 78 S.Ct. 1253 (1958).

25 Gerstein v. Pugh, 428 U.S. 103, 113 n 13, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975). This Court recently held that "a duly authorized law enforcement officer [may] make a warrantless arrest in a public place even though he had adequate opportunity to procure a warrant after developing probable cause for arrest", without violating the Fourth Amendment. U.S. v. Watson, 46 L.Ed.2d 598, 611 (Howell, J concurring), specifically reserving the question here presented.

26 Cf Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223, 3 O.Misc. 71, 31 O.Ops.2d 80 (1964); Kerr v. California, 374 U.S.23, 10 L.Ed.2d 726, 83 S.Ct. 1623, 24 O.Ops.2d 201 (1963); Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959); Giordenello v. United States, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245 (1958).

27 Wong Sun v. United States, 371 U.S. 471, 479, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

27a As will be shown in Part III, infra, the requirement of exigent circumstances has been inferentially accepted by this Court. U.S. v. Santana, ____U.S.____, 49 L.Ed.2d 300 (1976)

question of Federal law which has not, but should be, settled by this Court. Additionally, as will be shown in part II, infra, the District Court of Appeal for the First District, State of Florida, has decided a Federal question in a way which conflicts with the applicable decisional authority as to the modicum of probable cause necessary to prevent a warrantless incursion into a private dwelling, at night, for the purpose of making an arrest.

The Fourth Amendment provides, in pertinent part:

> The right of the people to be secure in their...houses...against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

It has been long recognized that the Fourth Amendment protects a right of privacy against unwarranted incursions by the police and other governmental officials. Perhaps the greatest protection secured by the Fourth Amendment is the right of the people to exclude the police from breaking into their homes, at night, without a warrant. Recognizing that "[t]he right of officers to thrust themselves into a home is...a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance",[28] the Courts have routinely held that a warrantless police incursion into private property, in a "search" context is per se unreasonable unless authorized by a warrant with the sole exception being viewed as one to permit prompt and necessary action in emergency situations.[29] Although the applicable standards for obtaining a search warrant have been

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28 Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

29 Cf Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

discussed at length by this Court, the Court below applied a different standard to the incursion here involved because it was characterized as an "arrest" as opposed to a "search", therefore distinguishing all of the protections of the Fourth Amendment and restricting their inquiry to the presence or absence of "probable cause." But, as noted by Judge Prettyman, the characterization of the police action as an "arrest" as opposed to a "search" is a distinction without constitutional difference.

> The officers entered the house to make a search. It was, to be sure, a search for a person rather than the usual search for an article of property, but it was a search. The officers made this indubitably clear in their testimony; they went into the house to look for [Petitioner]. It is true they intended to arrest him if they found him, and so the ultimate objective was an arrest. The government urges that this latter fact requires that we apply the rules of law pertaining to arrest rather than the rules governing search. But the search was a factual prerequisite to an arrest; it was the first objective of the entry; the officers did in fact search the house. They entered to make a search as a necessary prerequisite to possible arrest.
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> Morrison v. United States, 104 U.S. App. D.C., 352-355, 262 F.2d 449, 452 (1958).

That is not to say that all warrantless arrests are, per se, invalid for this Court has recognized several exceptions to the Fourth Amendment's general requirement for a warrant describing the "person...to be seized." First, and most obvious, is the situation where a suspect is reasonably believed to be armed and dangerous. Delay in arresting such a subject may well increase the danger to the community in the interim, and to the officers at the time of arrest. This consideration would bear materially on the ability of police to effectuate a warrantless arrest, even in a residence.[30]

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[30] Cf Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); Chappell v. United States, 119 U.S.App.D.C. 356, 352 F.2d 935 (1965).

Secondly, where there is strong reason to believe that the suspect will escape if not swiftly apprehended, or that a delay will permit the destruction of evidence by the suspect, arrest without warrant may be justified.[30a] Other considerations, including the gravity of the offense involved;[31] the modicum of probable cause available; and the circumstances under which the entry is made may affect the ability of police officers to arrest without warrant.

However, none of those factors was present in this case. The testimony at the Motion to Suppress unequivocally demonstrated that the prospective arrestee and other occupants of the house were unarmed; there was no danger of the destruction of evidence pending the three hour delay necessary to obtain the search warrant; no indication of impending departure by any occupant of the house was noted; and the sum total of the probable cause available to the police was that contraband was contained in a building contiguous to the premises under the control of an as yet unidentified white male.

At least four Circuits have adopted criteria for warrantless arrests in the home. The criteria were first set forth in the en banc decision of the District of Columbia Circuit in Dorman v. United States, 140 U.S.App.D.C. 313, 435 F.2d 385, 392 (1970). These criteria include the commission of a grave offense; a belief that the suspect is armed; probable cause to believe the suspect has committed the crime; suspicion that the suspect is on the premises; likelihood of escape if delay ensues; and the peaceful entry onto the premises by the police. These criteria have been adopted in the Fourth, Sixth, Eighth, and Ninth Circuits. Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v.

30a Cf U.S. v. Santana, supra and Part III, infra.

31 See, e.g., Warden v. Hayden, supra, McDonald v. United States, 335 U.S. 451, 459, 69 S.Ct. 191, 93 L.Ed. 153 (1948) (concurring opinion of Justice Jackson).

Shye, 492 F.2d 886 (6th Cir. 1974); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970). The application of these criteria to the decision below amply demonstrates the violation of the Fourth Amendment sanctioned in this cause.

II

One of the criteria utilized in determining whether a warrantless incursion into the privacy of a residence, at night, for the purpose of making an arrest, is the quantum of probable cause available at the time of the entry into the home. As the Second Circuit noted in Dorman v. United States, supra, "[t]here is some indication that at common law the degree of proof in hand was material in determining whether there was not merely probable cause for arrest, but authority for a 'breaking'." See Judge Prettyman's opinion in Accarino v. United States, 85 U.S.App.D.C. 394, 398-400, 179 F.2d 456, 460-61 (1949), cited as a comprehensive discussion in Miller v. United States, 357 U.S. 301, 307, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). The necessity for establishing a requirement for a high degree of probable cause in order to justify a warrantless incursion into a home, at night, is amply demonstrated by the facts of this case.

Upon arresting Mr. Cataldo and learning that he has purchased the marijuana from Chuck Brown at 6209 Shindler Drive, Detective Taylor called an Assistant State Attorney and was told that probable cause existed to obtain a search warrant for the home in question. The protection afforded by the warrant requirement, however, was illusory since the police accomplished the same incursion into the Petitioner's home through the simple expediency of characterizing their actions as an "arrest" rather than a search. Thus, while a belief "however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of

that house without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause",[32] the Court below has held that the same knowledge authorizes a forcible entry into that dwelling house by the police without warrant, for the purpose of making an arrest. The Fourth Amendment's protection of people in the privacy of their home cannot turn on so nice a distinction.

The Court below, by authorizing the police intrusion into the Petitioner's home, late at night, on the minimal probable cause available to them at the time that intrusion was made, clearly "leave[s] law abiding citizens at the mercy of the officers' whim or caprice..." Brinegar v. United States, 338 U.S. 160, 176, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949). Not only do the police have no incentive to obtain an arrest warrant under the rule of law sanctioned below, they have been affirmatively shown that the Fourth Amendment strictures applicable to searches and seizures can be easily circumvented by the pretext of characterizing their night time incursion into the home as a "search for bodies" as distinguished from a "search for evidence." It is respectfully submitted that, in the absence of any exigent circumstances or a quantum of probable cause well in excess of that evidenced in this cause, the search permitted here violated the Fourth Amendment to the United States Constitution, regardless of the object of that search.

III

This Court examined a similar question in United States v. Santana, supra. There, the question presented was whether a warrantless day time arrest, in a "public place" violated the Fourth Amendment. This Court held that, under the facts

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[32] Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145 (1925).

presented in Santana, supra, the warrantless arrest of the petitioner was not violative of the Fourth Amendment. The facts in United States v. Santana, supra, when compared to the facts in the instant case, support the argument herein contained and amply demonstrate the necessity of further consideration of this issue by the Court.

Santana also involved a "buy" by an undercover narcotics officer from a third party, one Patricia McCafferty. Unlike Mr. Cataldo, Patricia McCafferty had been involved in previous narcotics transactions involving the same undercover agent. Immediately after the "buy" was consummated, the officer returned to the location of the sale and, without entering onto private property, drew "within 15 feet of Santana and got out of their van, shouting 'police,' and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house."[33] Id. at 304.

In the context of a day time arrest, the Court considered the relevant factors in determining whether a violation of the Fourth Amendment had occurred. First, the Court noted that Ms. Santana "was not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house."[34] Therefore, when the police attempted to arrest her "they merely intended to perform a function which [the Court] had approved in Watson." Id.

The Court then considered the question of whether the fact that Santana attempted to thwart her otherwise lawful

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33 These facts are in sharp contrast to those presented here. Here, the delay between the narcotics "buy" and the subsequent arrest was a matter of hours, not minutes. The police in this cause neither identified themselves as police officers nor announced their purpose prior to entering onto the private property. Additionally, it affirmatively appears that no one was visible to the policemen in this cause prior to their driving through the gate and up the driveway in order to arrest all occupants of the house. Unlike Santana, this arrest occurred late at night, and did not involve "hot pursuit" to justify the police intrusion into the residence.

34 United States v. Santana, supra, at 305.

arrest by retreating into her house would cloak her with additional Fourth Amendment protections. While inferentially recognizing additional Fourth Amendment protections, not recognized in Watson, where entry into a domicile was required, the Court considered the types of exigent circumstances which have been required by the Circuit Courts.[35] The Court noted specifically that delay in arresting Ms. Santana would likely result in a destruction of the evidence necessary for her conviction. The Court recognized that the Fourth Amendment's protection of domicile was severely limited in a case involving "hot pursuit." [36] It is respectfully submitted that this Court's decision in United States v. Santana, supra, cannot be read to per se justify all warrantless arrests in a domicile during the day, nor does it intimate that no additional justification is necessary where such an arrest is to be effected late at night. Santana simply stands for the proposition that "a suspect may not defeat an arrest which has been set in motion in a public place...by the expedient escaping to a private place."[37] In the absence of the exigent circumstances specifically noted, and inferentially required, in this Court's opinion in United States v. Santana, supra, it is respectfully submitted that the Fourth Amendment's protections against police intrusion into a domicile at night, without warrant, cannot be countenanced under the clear command of the Fourth Amendment.

CONCLUSION

It is respectfully urged that this Court should issue its Writ of Certiorari to the District Court of Appeal for the First District, State of Florida; establish that the Fourth

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35 See Part I, infra.

36 Cf Warden v. Hayden, supra, Johnson v. United States, supra.

37 United States v. Santana, supra, at 306.

Amendment does not permit an unconsented night time entry of a dwelling to arrest all occupants therein without warrant in the absence of exigent circumstances; the contrary decision rendered by the Court below, and remand the case for further proceedings in accordance with this Court's decision.

Respectfully submitted,

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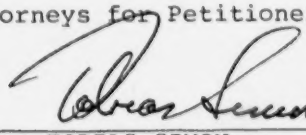
By 
TOBIAS SIMON

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of May, 1978 to Robert L. Shevin, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32304.